FILE COPY

Office-Supreme Court, U.S.
F
OCT 7 19
Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No. 425

THOMAS B. RUSTAD, HARVEY R. WYBORNEY, HOMER C. SKELLY, CHARLES DIVEN and JAMES JOHNSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

ROBERT BOOCHEVER,
JOHN H. DIMOND,
P. O. Box 1121, Juneau, Alaska,
Counsel for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Reasons for granting the writ	6
I. The Appellate Court should have reversed the conviction as the information failed to charge a crime	6
II. The trial court failed to place the burden on the Government to prove its case beyond a reasonable doubt	11
III. The Alaska Fisheries Regulations Section 121.3 and 121.4 as pertains to Zimovia Strait are too vague to be enforceable	14
Conclusion	17

Table of Authorities Cited

Cases	Pages
Alaska S.S. Co. v. Mullaney, 84 F. Supp. 561, affirmed 180 F. 2d 805	13
Brown v. Alaska Industrial Board, et al., C.A.-9, 1955, 224 F. 2d 680	16
Collins v. Kentucky, 234 U.S. 634	15
Connolly v. General Construction Co., 269 U.S. 385	15
Drossos v. United States (8 Cir.), 2 Fed. 2d 538	13
George C. Finn v. United States of America, 256 F. 2d 304	9
International Harvester Co. v. Kentucky, 234 U.S. 216	15
McRae v. People, 101 Cal. 155, 71 P. 2d 1042	13

Pages

State v. Brady, decided by the Supreme Court of North Carolina, October 14, 1953, 238 N.C. 404, 78 S.E. 2d 126 . . 12, 13
State v. DiAngelo, 133 Ohio State 362, 13 N.E. 2d 909 13
State v. Vliet, 120 N.J. Law 23, 197 Atl. 894 13
Sullivan v. State, 146 Tex. C.R. 79, 171 S.W. 2d 353 13

Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 91 L. Ed. 136 16
United States v. Manuszak, 234 F. 2d 421 9

Constitutions

United States Constitution, Fifth Amendment 13

Statutes

A.C.L.A., 1949, Section 58-5-1 (Fifth) 14

Alaska Commercial Fisheries Regulations, 1956, Department of the Interior Regulatory Announcement 48, issued April, 1956:
Section 121.3 . . . . . 2, 3, 4, 6, 7, 8, 14, 15
Section 121.4 . . . . . 2, 3, 4, 6, 8, 14, 15

Alaska Statehood Act, Public Law 85-508, 85th Congress, July 7, 1958 17

28 U.S.C., Section 1254(1) 2

48 U.S.C.:
Section 23 13
Section 221 . . . . . 3, 6
Section 222 . . . . . 2, 3, 4, 6

Rules

Federal Rules of Criminal Procedure, Rule 12(b)(2) 3, 9, 10

Texts

23 C.J.S. 940-941 12

Pacific Fisherman, Yearbook Number, January 25, 1956, p. 97 16

U. S. Department of the Interior, Fish & Wildlife Service, April 1956, Regulatory Announcement 48 5

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No.

THOMAS B. RUSTAD, HARVEY R. WYBORNEY, HOMER C. SKELLY, CHARLES DIVEN and JAMES JOHNSON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on June 30, 1958, Petition for Rehearing denied September 9, 1958.

OPINION BELOW.

The District Court did not render an opinion. The opinions of the Court of Appeals (R. 303-309) on the appeal and on the Petition for Rehearing (R. 313-314) are set forth in the Appendix hereto at pp. ii-xii and pp. xiii-xiv.

JURISDICTION.

The judgment of the Court of Appeals, dated June 30, 1958, was entered on that date. (R. 311.) Petition was filed for rehearing which was denied September 9, 1958. (R. 313.) The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254 (1).

QUESTIONS PRESENTED.

1. Petitioners were charged with the offense of fishing commercially in a closed area, namely, Zimovia Strait, Alaska, in violation of 48 U. S. Code 222. (Alaska Commercial Fisheries Regulations 1956, Sections 121.3 and 121.4, Department of the Interior Regulatory Announcement 48, issued April 1956.) Actually, the regulations did not prohibit fishing in Zimovia Strait and, accordingly, the information failed to charge a crime. This defect was not assigned as error, but was argued orally to the Court of Appeals. The question was first formally brought to the attention of the Court on Petition for Rehearing.

Shall the fact that an information fails to charge a crime be noticed at any time?

2. Was it error for the trial Court to instruct the jury that:

> "It is only necessary to prove that the defendants actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956."

over petitioners' objection that it was necessary for the government to prove such facts beyond a reasonable doubt?

3. Were the Alaska Commercial Fisheries Regulations for 1956, as pertains to the closure of Zimovia Strait, invalid due to indefiniteness?

STATUTES INVOLVED.

The case involves Sections 121.3 and 121.4 of the Alaska Commercial Fisheries Regulations, Department of the Interior, Regulatory Announcement 48 issued April 1956, under authority of 48 U.S. Code, Sections 221 and 222, which are printed in the Appendix, infra, pp. xv-xvii. Also involved is the applicability of Rule 12 (b) (2) of the Federal Rules of Criminal Procedure, printed in the Appendix, infra, p. xviii.

STATEMENT.

Petitioners were fishing commercially at about 12:30 P.M. on July 12, 1956 in Alaskan waters approximately 1.4 miles northwest of Thorne Point. They

were in broad daylight, in an unconcealed location. (R. 85.) While so fishing they were arrested by a Fish & Wildlife enforcement officer and were charged with the offense of fishing in a closed area, namely Zimovia Strait, in violation of 48 U.S.C., Section 222. (Alaska Commercial Fisheries Regulations 1956, Sections 121.3 and 121.4, Department of the Interior Regulatory Announcement 48, issued April, 1956.)

This regulatory announcement by means of Section 121.3 thereof prohibited fishing as follows:

> "Fishing, other than trolling, in Ernest Sound, and the open waters in the vicinity of Anan Creek (excluding Zimovia Strait) is prohibited except from 6 o'clock antemeridian July 15 to 6 o'clock postmeridian August 18 . . ."

The date "July 15" was subsequently amended to "July 12" by publication in the Federal Register on July 11, 1956.

Section 121.4 prohibited fishing in the following area:

> "Open season exception. With the exception of Ernest Sound and the vicinity of Anan Creek, fishing other than trolling is prohibited except from 6 o'clock antemeridian July 20 to 6 o'clock postmeridian August 24. During this season the weekly closed period except for trolling is extended to include the period from 6 o'clock postmeridian Friday to 6 o'clock antemeridian Monday."

The map regularly issued by the Fish & Wildlife Service during the season of 1956 showed the Sumner

Strait district divided in two sections with the Southerly half being shown as the Anan-Ernest Sound section. This map shows the Zimovia Strait area as a part of the Anan-Ernest Sound section. Petitioners were fishing in the section designated on this map (Exhibit D) as the Anan-Ernest Sound section.

The laws and regulations for the protection of the commercial fisheries, Regulatory Announcement 48, U. S. Department of the Interior, Fish & Wildlife Service, April 1956, did not describe the boundaries of Zimovia Strait nor refer to any particular map or chart so that such boundaries could be ascertained. (R. 86.) Moreover, the boundaries were not marked on the adjoining borders of land. (R. 98.)

The case was tried before a jury at Juneau, Alaska, the Court instructing the jury that,

> "It is only necessary to prove that the defendants actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July 1956."

over petitioners' objection that it was necessary for the government to prove such fact beyond a reasonable doubt. (R. 283). The jury returned a verdict of guilty on Febuary 20, 1957 and an appeal was taken to the United States Court of Appeals for the Ninth Circuit from the judgment and sentence entered on February 27, 1957 based on the jury's verdict. The judgment below was affirmed (R. 309) and Petition for Rehearing denied (R. 311) with Judge Pope dissenting (R. 313-314) for the reason that a serious question was presented as to "whether the regula-

tions as framed actually prohibited fishing in Zimovia Strait . . .".

REASONS FOR GRANTING THE WRIT.

I. THE APPELLATE COURT SHOULD HAVE REVERSED THE CONVICTION AS THE INFORMATION FAILED TO CHARGE A CRIME.

The information charged that petitioners were fishing in Zimovia Strait on July 12, 1956, the waters of Zimovia Strait then being an area closed to commercial fishing "within the meaning of 48 U. S. Code, Section 222 (Alaska Commercial Fisheries Regulations 1956, Sections 121.3 and 121.4)." (R. 3.) There is no general statutory closure of commercial fishing in Alaska aside from specific provisions dealing with fishing within a specified area from the mouth of streams which is not here involved. 48 U.S. Code, Section 221 authorizes the Secretary of the Interior to set apart fishing areas and to establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Section 222 makes it unlawful to fish in an area during the time that fishing is prohibited therein.

The particular regulations promulgated by the Secretary of the Interior under which petitioners were charged are Sections 121.3 and 121.4 of the Alaska Commercial Fisheries Regulations of 1956. Section 121.3 specified:

> "Fishing, other than trolling, in Ernest Sound, and the open waters in the vicinity of Anan Creek (excluding Zimovia Strait) is prohibited except

> from 6 o'clock antemeridian July 15 to 6 o'clock postmeridian August 18 . . ."

The date "July 15" was later changed to "July 12". (R. 133, 134.)

It is noted that this section prohibits fishing in "Ernest Sound and the open waters in the vicinity of Anan Creek", but excludes Zimovia Strait from the prohibition. Accordingly, it is clear that Section 121.3 does not prohibit fishing in Zimovia Strait.

Furthermore, it is also clear that Zimovia Strait is regarded in the Fisheries regulations as a portion of the waters of "Ernest Sound and the open waters in the vicinity of Anan Creek". In the only Fisheries map issued by the Bureau in Alaska, Petitioners' Exhibit "D", Zimovia Strait falls within the portion of the Sumner Strait District known as the Anan-Ernest Sound Section.

In fact the Court of Appeals, in its opinion, stated that Zimovia Strait was

> "in the Anan Section of the 'Sumner Strait Regulatory District' as delineated on the Southwest Alaska Commercial Fisheries Maps, published by the United States Fish & Wildlife Service." (R. 303.)

That Zimovia Strait is included in the reference to the waters of "Ernest Sound and the open waters of Anan Creek" is further substantiated by the fact that in the regulations it was deemed necessary to exclude Zimovia Strait when referring to those waters. If Zimovia Strait were not to be regarded as a portion

of "Ernest Sound and open waters in the vicinity of Anan Creek" there would be no reason for the inclusion in regulation 121.3 of the words "excluding Zimovia Strait". Accordingly, it appears perfectly clear that Section 121.3 did not prohibit fishing in Zimovia Strait.

The only other section referred to in the information is Section 121.4. This section states:

> "Open season exception. With the exception of Ernest Sound and the vicinity of Anan Creek, fishing other than trolling is prohibited except from 6 o'clock antemeridian July 20 to 6 o'clock postmeridian August 24. During this season the weekly closed period except for trolling is extended to include the period from 6 o'clock postmeridian Friday to 6 o'clock antemeridian Monday."

In essence this section states that with the exception of "Ernest Sound and vicinity of Anan Creek" fishing is prohibited until after July 20.

Again it is to be noted that Zimovia Strait is regarded as within the area designated as "Ernest Sound and the vicinity of Anan Creek". Since those waters are excepted from the prohibition, it was perfectly legal to fish therein. Accordingly, the information failed to charge a crime.

This point was not raised in the trial of the case before the District Court although it was strongly argued that the regulations were invalid due to indefiniteness. The failure of the information to charge an offense was brought out during the course of the oral argu-

ment before the Court of Appeals and was set forth in petitioners' Petition for Rehearing (R. 313) which was denied by that Court, with Judge Pope dissenting. A question of major importance is presented as to whether an Appellate Court must take notice of the failure of the information to charge a crime when not brought to the attention of the Court below. In that regard, Rule 12 (b) (2), Federal Rules of Criminal Procedure, specifies in part:

> "Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

Under somewhat similar circumstances the United States Court of Appeals for the Third Circuit has held in the case of *United States v. Manuszak*, 234 F. 2d 421:

> "Although the alleged defect was not brought to the attention of the District Court it can properly be raised in this court for such a defect shall be noticed at any time."

The Fourth Circuit has similarly ruled in the case of *George C. [illegible] v. United States of America*, 256 F. 2d 304. In that case the Court concluded that the information charged an offense, but stated the law to be as follows:

> "The point was not raised before trial, and not until after verdict did the defendant, by motion in arrest of judgment, question the sufficiency of the information. The Government's brief argues, without citing authority, that the point was waived

> because it was not raised by preliminary motion. We think the law is plainly to the contrary."

There thus appears to be a conflict as to the applicability of Rule 12 (b) (2) between the opinions of the United States Courts of Appeals of the Third and Fourth Circuits and the ruling of the United States Court of Appeals in the subject case.

While the Appellate Court's reasons for denying the Petition for Rehearing are not set forth, it appears from the dissenting opinion of Judge Pope that the majority rested its decision on an alleged inference that petitioners had reason to think that the regulations prohibited fishing in the area involved. (R. 314.) Judge Pope commented on this reasoning as follows:

> "I would doubt that a person could be convicted of violation of a regulation that did not cover his case, just because the accused thought it did."

It is respectfully submitted that major questions are presented by this petition as to defects in the information constituting failure to charge a crime; as to when such defects may be noticed; as to whether inferences as to the accuseds' mental attitude should be considered as disposing of such questions; and as to the interpretation and force to be given to Rule 12 (b) (2).

II. THE TRIAL COURT FAILED TO PLACE THE BURDEN ON THE GOVERNMENT TO PROVE ITS CASE BEYOND A REASONABLE DOUBT.

The Court gave Instruction No. 10 as follows:

> "It is not necessary that the government prove that the defendants intended to fish illegally or that they knew they were fishing illegally at the time in question. It is only necessary to prove that the defendants actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956." (R. 10.)

Timely exception was taken to this instruction as follows:

> "I also except to Instruction No. 10 wherein the Court states 'It is only necessary to prove that the defendants (280) actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956' for the reason that I do not believe it is a correct statement of law, even on the theory of law on which the case is presented, and that it should state 'It is necessary to prove beyond a reasonable doubt that the defendants actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956, to find the defendants guilty'."
>
> "The Court. You may have your exceptions." (R. 283.)

Although it would have been a simple matter for the Court to correct the instruction to make clear to the jury the necessity of the government to prove its case beyond a reasonable doubt, the learned trial judge refused so to do. It is well established that in a criminal prosecution, the government must probe its case

beyond a reasonable doubt. It is true that the trial judge, in his Instruction No. 4, set forth the requirement that the burden of proving the offense charged beyond a reasonable doubt is on the prosecution. It is recognized that instructions must be regarded in their entirety. Nevertheless,

> "an incomplete or incorrect instruction is not cured where, when construed together with the other instructions, it is still calculated to prejudice the substantial rights of accused, and, where an erroneous instruction consists of a palpable misstatement of law, it is not cured by a conflicting or contradictory one which correctly states the law on the point involved, . . . Likewise, an instruction which attempts to cover the whole case, but which omits an essential element, is not cured by another covering the omitted point; . . ." (23 C.J.S. 940-941.)

By stating that it was "*only* necessary to prove that the defendants actually fished commercially for salmon in the waters of Zimovja Strait on the 12th day of July, 1956", the trial Court left matters about where they would have been had no instruction on the burden of proof been given. Instruction 10 was an attempt to cover the entire case in one instruction, and it incorrectly stated the law!

This matter is discussed in the case of *State v. Brady*, decided by the Supreme Court of North Carolina, October 14, 1953, 238 N.C. 404, 78 S.E. 2d 126, wherein the Court stated:

> "III. The third question challenges portions of the charge particularly the concluding instruction

in respect to the possession of whiskey at the time here charged, that 'if the State has satisfied you upon all the evidence in this case that he had it there for the purpose of sale, then, gentlemen, you should return a verdict of guilty.'

"The vice pointed out in the instruction is the degree of proof, that the jury be 'satisfied', instead of the correct degree 'satisfied beyond a reasonable doubt'.

"In this connection it is true that in some other portions of the charge the correct rule is given. Nevertheless, where the court charges correctly in one part of the charge, and incorrectly in another, it will be held for error, since the jury may have acted upon that which is incorrect."

See also *State v. Brady*, 238 N.C. 407, 78 S.E. 2d 129; *Drossos v. United States* (8 Cir.), 2 Fed. 2d 538; *McRae v. People*, 101 Cal. 155, 71 P. 2d 1042; *State v. DiAngelo*, 133 Ohio State 362, 13 N.E. 2d 909; *State v. Vliet*, 120 N.J. Law 23, 197 Atl. 894; *Sullivan v. State*, 146 Tex. C.R. 79, 171 S.W. 2d 353.

Title 48 U.S. Code, Section 23 specifies, with reference to Alaska, that:

"The Constitution of the United States and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States."

Thus the Fifth Amendment to the Constitution is applicable. *Alaska S.S. Co. v. Mullaney*, 84 F. Supp. 561, affirmed 180 F. 2d 805.

In addition to the requirement of due process, Alaska has a statute (Section 58-5-1 (Fifth) ACLA 1949) specifiying:

> "that in criminal cases guilt shall be established beyond a reasonable doubt."

This case presents a substantial question involving the administration of criminal proceedings and the constitutional rights of an accused not to be deprived of liberty or property without due process of law.

The trial judge by Instruction No. 10 attempted to cover the entire case by one instruction and by so doing, deprived petitioners of the due process of law since the government was not required to prove its case beyond a reasonable doubt.

III. THE ALASKA FISHERIES REGULATIONS SECTION 121.3 AND 121.4 AS PERTAINS TO ZIMOVIA STRAIT ARE TOO VAGUE TO BE ENFORCEABLE.

Petitioners were fishing at a point 1.4 miles northwest of Thorne Point at the time they were apprehended.

The fishing regulations do not define the boundaries of Zimovia Strait. According to the U. S. Department of Agriculture, Forest Service official map of the Tongass National Forest, Alaska, 1951, Exhibit C, the body of water designated as Zimovia Strait is a narrow neck of water northwest of the area where petitioners were fishing. It is similarly shown on United States Coast & Geodetic Chart No. 8201. The area where petitioners were fishing, according to these maps, appears to be in the waters of Ernest Sound

rather than Zimovia Strait. Admittedly other maps are subject to a more ambiguous construction as to the boundaries of Zimovia Strait. The only official map issued by the U. S. Fish & Wildlife Service (Exhibit D) does not designate the area known as Zimovia Strait at all.

Under those circumstances in view of the location where the petitioners were fishing at the time they were apprehended, it is respectfully submitted that the fisheries regulations 121.3 and 121.4 are unenforceable as lacking in definiteness.

This learned Court stated in the case of *Connolly v. General Construction Co.*, 269 U.S. 385 at 391.

> "that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

See also *International Harvester Co. v. Kentucky*, 234 U.S. 216 at 221; *Collins v. Kentucky*, 234 U.S. 634 at 638.

These objections to the validity of the regulations were timely raised by the petitioners in their Motion for Judgment of Acquittal made at the conclusion of the government's case (R. 132); renewed at the

conclusion of the entire case (R. 260); by petitioners' Motion for Judgment of Acquittal notwithstanding the verdict (R. 284-285); and in the Appellate Court by Petitioners' Statement of Points 5, 6, 7 and 8. (R. 29.)

It would have been a simple matter for the Fish & Wildlife Service to have defined the term Zimovia Strait either by reference to latitude and longitude, to fixed points of land, by placing markers or by reference to a particular map or chart.

The regulation further fails due to vagueness for the reasons set forth under the first question presented by this petition (see supra, pp. 6 to 10) in that it is not clear that fishing in Zimovia Strait was prohibited. Regulations as confusing as the subject ones do not meet the basic requirements of due process of law.

The Alaksa fisheries are an important national resource. During the ten year period from 1945 to 1955, the salmon packed in Alaska had an average value of $75,286,120.00 (Pacific Fisherman, Yearbook Number, January 25, 1956, p. 97). Accordingly, the regulations controlling this fishery are a matter of national interest. Moreover, interstate commerce is directly affected by this business, not only in the shipment of the product, but also due to the great migratory movement of workers from the Pacific Coast States to Alaska to participate in the seasonal activities. *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 146, 91 L. Ed. 136, 141; *Brown v. Alaska Industrial Board, et al.*, CA-9, 1955, 224 F. 2d 680, 681.

Under the Alaska Statehood Act, Public Law 85-508, 85th Congress, July 7, 1958, the regulation of the fisheries will be turned over to the new state after the "Secretary of Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management and conservation of said resources in the broad national interest." This provision indicates Congressional recognition that Alaska fisheries are a matter of grave national concern. As the time for a change in the administration of the fisheries to the new state approaches it is exceedingly important that proper criteria for the establishment of valid regulations be established. To permit regulations as vague and ambiguous as those which have caused this litigation would be to invite chaos in this major industry.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, Juneau, Alaska,
September 24, 1958.

ROBERT BOOCHEVER,
JOHN H. DIMOND,
Counsel for Petitioners.

(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

Thomas B. Rustad, Harvey R. Wyborney, Homer C. Skelly, Charles Diven and James Johnson, Appellants, vs. United States of America, Appellee.	No. 15,720

JUDGMENT

Appeal from the United States District Court for the District of Alaska, First Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska, First Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment

Filed and entered: June 30, 1958,

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Thomas B. Rustad, Harvey R. Wyborney, Homer C. Skelley, Charles Diven and James Johnson, Appellants, vs. United States of America, Appellee.	No. 15,720 June 30, 1958

Appeal from the United States District Court for the District of Alaska, First Division

---

Before: POPE, BARNES and HAMLEY, Circuit Judges

BARNES, Circuit Judge:

If a vessel sought to go south from the City of Wrangel situated on the northernmost tip of Wrangel Island in southeast Alaska, it could proceed along the easterly side of the island through the Eastern Passage, Blake Channel, and Anan Creek area to a point immediately south of Wrangel Island and north of Deer Island in Ernest Sound, *or*, it could sail along the westerly side of Wrangel Island through Zimovia Strait to the same point in Ernest Sound north of Deer Island. All of these named bodies of water are in the Anan section of the "Sumner Strait Regulatory District," as delineated on the Southeast

Alaska Commercial Fisheries Maps, published by the United States Fish and Wildlife Service.

At about 12:30 p.m. on July 12, 1956, the defendants' vessel was found fishing commercially at a point allegedly located within Zimovia Strait. The Captain and four members of the crew (appellants herein) were arrested, and charged with a violation of 48 U.S.C. § 222,[1] which makes violations of regulations issued by the Secretary of Interior under the authority of 48 U.S.C. § 221, criminal offenses. 48 U.S.C. § 226[2] provides for fine and imprisonment for any

---

[1]Title 48 U.S.C. § 222. "Unlawful fishing in areas; no exclusive rights to be granted; citizens

From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trip, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given; *Provided*, That every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior. June 6, 1924, c. 272, § 1, 43 Stat. 464; June 18, 1926, c. 621, 44 Stat. 752; 1939 Reorg. Plan No. II, § 4(e), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433."

[2]Title 48 U.S.C. § 226. "Violation of fishing laws; punishment; forfeiture

Any person, company, corporation or association violating any provisions of sections 221-228 or 230-241 of this title, or of any regulation made under authority of said sections shall, upon conviction thereof be punished by a fine not exceeding $5,000 or imprisonment for a term of not more than ninety days in the county jail or by both such fine and imprisonment, and in case of the violation of section 233 of this title there

such violation, *i.e.*, fishing in a closed area. The regulations which defendants were charged in the information with violating were sections 121.3 and 121.4 of Alaska Commercial Fisheries Regulations, 1956.

The case was tried before a jury in the District Court of the First Judicial District of Alaska where Zimovia Strait is located. (48 U.S.C. § 101.) The sole issue submitted to the jury was whether or not appellants' boat was fishing in Zimovia Strait. All defendants were convicted. A motion for a judgment notwithstanding the verdict was denied. Captain Rustad was fined $1,500, the crew $750 each; and the balance of their catch was forfeited. Appeal lies here. 28 U.S.C. § 1291.

Alaska Fisheries Regulations Section 121.4, in effect on July 12, 1956, and for some time prior thereto, reads:

> "With the exception of Ernest Sound and the vicinity of Anan Creek, fishing . . . is prohibited except from . . . July 20 . . ."[3]

---

may be imposed a further fine not exceeding $250 for each day the obstruction therein declared unlawful is maintained. Every boat, seine, net, trap and every other gear and appliance used or employed in violation of said above-mentioned sections and all fish taken therein or therewith shall be forfeited to the United States and shall be seized and sold under the direction of the court in which the forfeiture is declared at public auction and the proceeds thereof after deducting the expenses of sale shall be disposed of as other fines and forfeitures under the laws relating to Alaska. Proceedings for such forfeiture shall be in rem under the rules of admiralty. June 6, 1924, c. 272, § 6, 43 Stat. 466."

[3]Alaska Fishery Regulations § 121.4 reads in its entirety:

"Open season; exception. With the exception of Ernest Sound and the vicinity of Anan Creek, fishing, other than trolling, is prohibited, except from 6 o'clock antemeridian July

Alaska Fisheries Regulations Section 121.3 read on July 10th and prior thereto as follows:

> "Fishing . . . in Ernest Sound and the open waters in the vicinity of Anan Creek (excluding Zimovia Strait) is prohibited except from . . . July 15 . . ."[4]

On July 11, 1956, Regulation § 121.3 was amended to strike the words "July 15" and to substitute therefor the words "July 12." This amendment was published at Washington, D.C., on July 11, 1956. The early opening day information was conveyed to the Fish & Wildlife Service in Alaska by telegram which read as follows:

> "Alaska Fishery Regulation 121.3 amended to open Anan and Ernest Sound section at six o'clock antemeridian July twelve. This action taken because adequate early escapement of pink salmon assured in Anan Creek as revealed by ground survey of stream and aerial survey of approaches by FWS officials July seven. Advise interested parties." [Defendants' Exhibit A.]

It is noted this contained a specific reference by number to the regulation amended, and instructed the

---

20 to 6 o'clock postmeridian August 24. During this season the weekly closed period, except for trolling, is extended to include the period from 6 o'clock postmeridian Friday to 6 o'clock antemeridian Monday."

[4]Alaska Fishery Regulations § 121.3 read in its entirety:

"*Open season, Ernest Sound and Anan.* Fishing, other than trolling, in Ernest Sound and the open waters in the vicinity of Anan Creek (excluding Zimovia Strait) is prohibited except from 6 o'clock antemeridian July 15 to 6 o'clock postmeridian August 18. During this season the weekly closed period, except for trolling, is extended to include the period from 6 o'clock postmeridian Friday to 6 o'clock antemeridian Monday."

Wildlife Service to inform all interested parties. The Service sent telegrams to various fisheries asking that interested parties be advised of the earlier opening date, but these telegrams contained no reference to the regulation number. They read:

> "The *Ernest Sound* and *Anan section* of the Sumner Strait District will open at 0600 am July 12 instead of July 15. Please advise interested parties." [Defendants' Exhibit B.]

Appellants claim error because:

(1) Failure of the court to rule as a matter of law that the regulation was invalid because of indefiniteness.

(2) The two telegrams amended the regulation sought to be enforced so as to open Zimovia Strait for fishing on July 12, or estopped the government to deny it was open.

(3) The same telegrams rendered the regulations invalid because of indefiniteness.

(4) Failure to give defendants' requested instruction #1.

(5) The giving of Government Instruction #10.

(6) In withholding government Exhibits A and B from the jury room.

The indefiniteness relied on in point one is the use of the term "Zimovia Strait." Appellants point to their Exhibit C, a United States Department of Agriculture Map delineating the boundaries of the

"Tongass National Forest," extending some eight hundred miles north and south. It is true that from that government map it would be difficult, though not impossible, to determine where Zimovia Strait starts and ends. But we assume accomplished seamen would not rely on a Department of Agriculture Map any more than they would rely on an oil company's road map, or a World Atlas showing the North Pacific Ocean on one page. On Appellee's Exhibit 1, for example, the Zimovia Straits are clearly marked and can hardly be missed by anyone reading the navigational chart (which that Exhibit is) with the degree of intelligence to be expected of the licensed master of a vessel. These commercial fishermen were not Sunday sailors landlocked most of the week. They used a map with fathoms, shoalings and magnetic compass markings on it. Government's Exhibit 1 was in fact on the fishing vessel at the time of arrest. As might be expected, it was a United States Coast and Geodetic Survey Map, #8161, covering "Ernest Sound, Eastern Passage, and Zimovia Strait," a total area extending some forty to fifty miles north and south. The point of arrest and the point where the vessel was fishing was 1.4 miles northwest of Thorns Point and immediately opposite the letter "R" in the words Zimovia Strait, as they appear on this map then being used.

Of the many fishing boats out on the opening day, none but this captain and crew had any difficulty in determining the limits of Zimovia Strait and where they should not fish.

Appellants cite in support of their position that Zimovia Strait is an indefinite description of the boundaries of the proscribed territory those cases involving fishing at the mouth of rivers where the limits of the river's mouth have not been designated by statute, such as *Booth v. United States,* 9 Cir., 1925, 6 F.2d 500. From this it is argued that either the exact longitude or latitude of the area must be stated, or that the area itself must by physically marked—that without such aids the regulation, of necessity, was so uncertain and indefinite as to be unenforceable for lack of due process. Appellee does not dispute the validity of such a rule of law, but urges that it is not here applicable, that the statutes employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly aply them, or having a well settled common-law meaning. *Connally v. General Construction Co.,* 1926, 269 U.S. 385, 391.

With two valid theories of law presented, within which should this regulation fall? Our opinion is that the regulation is reasonably clear for the purposes intended. Zimovia Strait is clearly marked on the maps introduced in evidence. Zimovia Strait is no river mouth which may have a changing and indeterminate location, but a well-defined land conformation clearly marked on the official charts of the United States Coast & Geodetic Survey maps. It would seem that the reference to Zimovia Strait in the regulation would be perfectly clear to those concerned and technically qualified, as would be commercial fisherman in the area.

Defendants' second point is that the telegrams of July 11 (a) either opened Zimovia Strait to fishing or (b) at least are sufficient to estop the government from prosecuting those reasonably relying on those telegrams, or (c) they amend the regulation to make it vague and indefinite and therefore invalid. Appellee counters that the telegram (Exhibit A) is not capable of any interpretation other than the one found by the trial court—that it merely changed the opening dates for fishing in the areas coveed by *§121.3, i.e.,* Ernest Sound and the Anan Creek areas, *excluding the Zimovia Strait area.*

The trial court was correct in his view that the telegrams were not ambiguous or subject to any interpretation other than that a change in opening day had occurred. These defendants were commercial fishermen; their whole livelihood was regulated by the Secretary of the Interior pursuant to these regulations. They certainly were or should have been familiar with them. The telegram to the Wildlife Service (Exhibit A) specifically names the section being amended and thereby eliminates all possibility of confusion. The wire to the Fisheries (Exhibit B) names the districts only, but mentions the original date of July 15th, thus indicating first, that only the day is being changed, and second, that no areas subject to an opening day other than July 15th (such as those governed by the July 20th date of § 121.4 which *includes* Zimovia Strait) are affected by the amendment. Any other interpretation would render the reference to July 15th meaningless.

In support of the argument for ambiguity, appellants point out that it was broad daylight, that they were not hiding, and that they did not run from sight of the arresting officer's plane. Appellee points out in reply that of the two hundred and seventy-five boats out on opening day and near the legal areas, appellants' boat was the only one in the forbidden area. We think the trial judge was correct in his conclusion that the meaning and effect of the amending telegrams was not ambiguous.

Once it is established that the regulation was not ambiguous and did not open the area to fishing, any instruction on reliance upon ambiguity becomes irrelevant and is nothing more than an attempt to get before the jury that issue of law, and its interpretation, decided against appellants by the court as a matter of law.

As to the instruction concerning burden of proof, it was concerned only with the absence of need to prove intent—to that end the court said the government need only prove the act. However, instructions 3 and 4 stated the government's entire burden correctly; No. 5 was devoted solely to the subject of reasonable doubt. And, No. 18 warned the jury not to consider just one instruction, but to make their decision in the light of all the instructions given. No. 10, complained of, in no way misled the jury and was not intended nor did it in fact establish a different burden of proof.

Exhibits A and B were properly withheld from the jury after the court had decided as a matter of law

the jury could not determine the alleged questions of ambiguity and estoppel. If correct in its rulings, as we have said it was, there could be no purpose in submitting Exhibits A and B to the jury.

The judgment is *affirmed*.

POPE, Circuit Judge, Concurring:

I find myself in accord with substantially everything that is stated in the court's opinion. The only qualification I would make is the statement that the date of Sec. 121.4 includes Zimovia Strait. Had the appellants raised the point I think it would be a serious question whether the prohibition stated in that section extended to Zimovia Strait, thus raising doubt as to whether there was any closed season in that strait. The section contains an express exception: "With the exception of Ernest Sound and the vicinity of Anan Creek". But that area would appear to include Zimovia Strait, for the drafters of Sec. 121.3 found it necessary to make an express exclusion of this strait. That is, a reading of 121.3 seems to indicate that "Ernest Sound and . . . . the vicinity of Anan Creek", so described, would ordinarily include Zimovia Strait.

But such a point was not preserved at the trial nor made in the specifications of error here. If the matter were entirely clear, and if it were plain that the regulations simply did not provide any prohibitions as to Zimovia Strait, we might be called upon to notice the point as a plain error under Criminal Rule 52(b). But I am satisfied that the matter is not so plain, but that

there is sufficient ambiguity in this part of the regulations so that we may accept the administrative construction of the section under the rule of Norwegian Nitrogen Co. v. U.S., 288 U.S. 294, 315, and cases there cited. Cf. Doyle v. Fox, 9 cir. 234 F. 2d 830, 833. Hence we are not called upon to notice a point not made by the parties.

(Endorsed:) Opinion and Concurring Opinion. Filed June 30, 1958.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Thomas B. Rustad, Harvey R. Wyborny, Homer C. Skelley, Charles Diven and James Johnson, Appellants, vs. United States of America, Appellee.	No. 15,720 ORDER Sept. 9, 1953

On Petition for Rehearing

Before: POPE, BARNES and HAMLEY, Circuit Judges

The petition for rehearing is denied.

POPE, C. J., dissenting.

In my concurring opinion of June 30, 1958, I noted the reason there is doubt as to whether there was any closed season in Zimovia Strait at the time stated in the information. However I stated my concurrence in the judgment of affirmance on the ground that the point had not been raised at the trial or on appeal here and I felt that under the circumstances we would not be called upon to notice the point as a plain error under Rule 52(b).

Upon the petition for a rehearing appellants have called attention to the fact that if the regulations did not provide any prohibition as to Zimovia Strait, then

the information did not state an offense. They also note that under Criminal Rule 12(b)(2), the failure of an information to charge an offense shall be noticed by the court at any time. The petition further suggests that there is no substantial proof of an administrative construction of the regulations such as that which I refer to in my former opinion.

I am bearing in mind the proposition that a person should not be fined or imprisoned for violation of a statute or regulation which is ambiguous or uncertain. Since I think it is a serious question whether the regulations, as framed, actually prohibited fishing in Zimovia Strait at the time in question, I think now that we should grant a rehearing since Rule 12(b)(2) would appear to make it appropriate for us to consider the matter.

It is suggested that at the time of the alleged offense appellants had reason to *think* the regulations covered this area, and did not then act in reliance upon these defects. Thus other fishermen stayed away.

I would doubt that a person could be convicted of violation of a regulation that did not cover his case, just because the accused thought it did.

(Endorsed:) Order and Dissenting Opinion on Petition for Rehearing. Filed Sept. 9, 1958.

Paul P. O'Brien, Clerk.

§221. *Fishing areas; closed season; limitation on fishing*

For the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of the Interior from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. June 6, 1924, c. 272, § 1, 43 Stat. 464; June 18, 1926, c. 621, 44 Stat. 752; 1939 Reorg. Plan No. II, § 4 (e), eff. July 1, 1939, 4 F. R. 2731, 53 Stat. 1433.

§222. *Unlawful fishing in areas; no exclusive rights to be granted; citizens*

From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided,* That every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior. June 6, 1924, c. 272, § 1, 43 Stat. 464; June 18, 1926, c. 621, 44 Stat. 752; 1939 Reorg. Plan No. II, § 4 (e), eff. July 1, 1939, 4 F. R. 2731, 53 Stat. 1433.

Alaska Fishery Regulations, Section 121.3

Open season, Ernest Sound and Anan. Fishing, other than trolling, in Ernest Sound and the open waters in the vicinity of Anan Creek (excluding Zimovia Strait) is prohibited except from 6 o'clock antemeridian July 15 to 6 o'clock postmeridian August 18. During this season the weekly closed period, except for trolling, is extended to include the period from 6 o'clock postmeridian Friday to 6 o'clock antemeridian Monday.

Alaska Fishery Regulations, Section 121.4

Open season; exception. With the exception of Ernest Sound and the vicinity of Anan Creek, fishing, other than trolling, is prohibited, except from 6 o'clock antemeridian July 20 to 6 o'clock postmeridian August 24. During this season the weekly closed period, except for trolling, is extended to include the period from 6 o'clock postmeridian Friday to 6 o'clock antemeridian Monday.

Federal Rules of Criminal Procedure—Rule 12(b)(2)

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.